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No. 07-1470

In the Supreme Court of the United States

UNITED STATES STEEL CORPORATION, ET AL.,
PETITIONERS

v.

CANADIAN LUMBER TRADE ALLIANCE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that Section 102(c) of the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act), 19 U.S.C. 3312(c), did not bar plaintiffs' challenge of the United States Bureau of Customs and Border Protection's interpretation of the Continued Dumping and Subsidy Offset Act of 2000, Pub. L. No. 106-387, App.—H.R. 5426, Tit. X, 114 Stat. 1549A-72, as applying to antidumping duties collected upon Canadian goods.

2. Whether Section 408 of the NAFTA Implementation Act is an impermissible legislative entrenchment provision.

3. Whether petitioners, who intervened as defendants in actions brought by plaintiffs whose complaints were dismissed, are proper parties to seek certiorari from a judgment in favor of another plaintiff whose claims were consolidated with the actions in which petitioners intervened.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-49a) is reported at 517 F.3d 1319. The opinions of the United States Court of International Trade (Pet. App. 50a-176a) are reported at 425 F. Supp. 2d 1321 and 441 F. Supp. 2d 1259.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2008. The petition for a writ of certiorari was filed on May 27, 2008 (the Tuesday following Memorial Day). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress approved and implemented the North American Free Trade Agreement (NAFTA or Agreement), 32 I.L.M. 605 (1993), through the North American Free Trade Agreement Implementation Act (NAFTA Implementation Act or NIA), Pub. L. No. 103-182, 107 Stat. 2057, 19 U.S.C. 3301 *et seq.* Section 408 of the NIA provides that any amendment to United States antidumping and countervailing duty law "enacted after the Agreement enters into force with respect to the United States * * * shall apply to goods from a NAFTA country only to the extent specified in the amendment." 19 U.S.C. 3438. Section 102(c) of the NIA states, in part, that "[n]o person other than the United States * * * shall have any cause of action or defense under * * * the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. 3312(c)(1)(A).

2. In 2000, Congress modified the disbursal of funds collected pursuant to antidumping and countervailing duty orders through enactment of the Continued Dumping and Subsidy Offset Act of 2000 (CDSOA), Pub. L. No. 106-387, App.—H.R. 5426, Tit. X, 114 Stat. 1549A-72. 19 U.S.C. 1675c (2000). Pursuant to the CDSOA, the United States placed funds received from antidumping and countervailing duty orders in special sub-accounts within the United States Treasury, and later disbursed the funds to qualifying domestic producers that were affected by the unfair trade practices that gave rise to the antidumping or countervailing duty. 19 U.S.C. 1675c. The CDSOA did not expressly state that its provisions applied to Canadian or Mexican merchandise. On February 8, 2006, Congress repealed the CDSOA, with effect on all goods imported on or after October 1,

2007. Pub. L. No. 109-171, Tit. VII, subtit. F, § 7601(a) & (b), 120 Stat. 154.

3. In 2005, Canadian producers of softwood lumber, magnesium, and red wheat—merchandise subject to countervailing or antidumping duty orders—commenced separate actions in the Court of International Trade, challenging the application of the CDSOA to duties collected on their Canadian merchandise. Pet. App. 11a.[1] The Government of Canada brought a similar action, seeking general relief with respect to Canadian merchandise subject to countervailing or antidumping duties. *Ibid.* Specifically, plaintiffs alleged that United States Bureau of Customs and Border Protection (Customs) is not permitted to disburse to domestic producers CDSOA monies resulting from antidumping and countervailing duties imposed upon Canadian merchandise because Congress did not intend the CDSOA to apply to goods from Canada. *Ibid.* Plaintiffs requested a declaratory judgment, a permanent injunction against further distributions to domestic producers, and disgorgement of prior distributions to domestic producers. *Id.* at 11a-12a.

Petitioners intervened in the respective actions concerning disbursement of duties of which they were recipients. Petitioner U.S. Magnesium intervened in the action brought by respondent Norsk Hydro Canada Inc. with respect to distribution of duties to domestic producers of pure and alloy magnesium, including U.S. Magnesium. 05-cv-00325 Docket entry No. 17 (Ct. Int'l Trade July 5, 2005); *id.*, entry No. 24 (July 12, 2005). Petitioner United States Steel intervened in the action

[1] Plaintiffs' suit, brought pursuant to 28 U.S.C. 1581(i), was governed by the Administrative Procedure Act, 5 U.S.C. 702. See 28 U.S.C. 2640(e); Pet. App. 11a.

brought by the Government of Canada, which encompassed distribution of duties to domestic producers of corrosion-resistant carbon steel flat products, cut-to-length carbon steel plate, and oil country tubular goods, all of which were produced by United States Steel. 05-cv-00327 Docket entry No. 28 (Ct. Int'l Trade July 5, 2005); *id.*, entry No. 41 (July 7, 2005). Neither petitioner sought to intervene in the action brought by the Canadian Wheat Board (Board), which challenged Customs' application of the CDSOA to duties collected on Canadian spring red wheat. After petitioners had intervened in the individual Norsk Hydro Canada and Government of Canada actions, all the Canadian actions were consolidated in the Court of International Trade. See 05-cv-00324 Docket entry No. 29 (Ct. Int'l Trade July 13, 2005).

Following briefing and a factual hearing on the issue of injury for purposes of Article III standing, the Court of International Trade held that the private Canadian plaintiffs, but not the Government of Canada, possessed standing. Pet. App. 102a, 107a. The court further held that the private plaintiffs' claims were not barred by Section 102(c) of the NIA, 19 U.S.C. 3312(c). Pet. App. 119a-137a. The court reasoned that the bar against causes of action or defenses "under * * * the Agreement or by virtue of Congressional approval thereof," 19 U.S.C. 3312(c)(1)(A), made clear that "neither the Agreement or Congress' consent thereto [in NIA Section 101(a), 19 U.S.C. 3311(a)], would create a right of action under NAFTA itself," but did "not foreclose rights of action under" other provisions of the NIA that "separately implemented portions of that Agreement by enacting specific provisions into domestic law." Pet. App. 130a-131a.

On the merits, the trial court held that Section 408 of the NAFTA Implementation Act, 19 U.S.C. 3438, "function[s] as [a] background canon[] of interpretation of which Congress [was] presumptively aware" when it enacted the CDSOA, Pet. App. 148a (quoting *Lockhart* v. *United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring)). The court found neither a "necessary" nor even a "fair" implication that Congress intended the CDSOA to apply in contravention of the interpretive guidance of Section 408, and on that basis it concluded that Congress did not intend to apply the CDSOA to antidumping and countervailing duties collected upon products from Canada and Mexico. *Id.* at 147a. With respect to remedies, the court declined to order disgorgement of duties that had already been disbursed to domestic industries by Customs. *Id.* at 158a-173a. The court entered a declaratory judgment that the CDSOA "does not apply to antidumping and countervailing duties assessed on imports of goods from Canada or Mexico," *id.* at 160a, 175a, and also ordered prospective injunctive relief, *id.* at 160a-161a, 175a-176a. Because it had dismissed the claims of the Government of Canada, the Court of International Trade expressly limited its injunctive relief to future distributions of duties derived from softwood lumber, hard red spring wheat, and magnesium imported from Canada. *Id.* at 175a-176a.

4. The United States appealed the trial court's holding that the private Canadian plaintiffs possessed standing, the Government of Canada appealed the trial court's holding that it lacked standing, and petitioners and certain other domestic producers that had intervened in the trial court appealed that court's holdings that: (1) the private Canadian plaintiffs possessed standing; (2) Section 102(c) of the NAFTA Implementation Act did not

bar the private plaintiffs' claims; and (3) the CDSOA does not apply to antidumping and countervailing duties collected upon merchandise from Canada and Mexico. The private Canadian plaintiffs did not appeal the judgment of the Court of International Trade to the extent it denied their request for disgorgement of already distributed duties. Pet. App. 36a. The North Dakota Wheat Commission, the one domestic entity that had intervened in the Court of International Trade in the proceeding brought by the Canadian Wheat Board, withdrew its intervention on July 13, 2006, and did not appeal. See 05-cv-00324 Docket entry No. 142 (Ct. Int'l Trade).

The court of appeals vacated the trial court's judgment and remanded with directions to dismiss as to the claims brought by all but one of the private Canadian plaintiffs because their suits had become moot. Pet. App. 36a-37a. The court of appeals affirmed the judgment with respect to the remaining plaintiff. *Id.* at 48a-49a. With respect to the claims by the Canadian producers of softwood lumber and magnesium, the court held that post-judgment developments had rendered their claims moot. *Id.* at 36a-37a. The court noted that two significant actions occurred shortly after the Court of International Trade's judgment. First, the United States and Canada had entered into an Executive Agreement in which the United States agreed to revoke, retroactive to May 2002, the antidumping and countervailing duty orders concerning Canadian softwood lumber. *Id.* at 15a. Second, pursuant to that Executive Agreement, the Department of Commerce had instructed Customs to cease collecting duty deposits on softwood lumber as of October 12, 2006, to liquidate all unliquidated entries without regard to the revoked orders,

and to refund to the importers of record any deposits that had been collected pursuant to the revoked orders. *Id.* at 15a-16a. The court of appeals held that, because there was "no threat of further injury to the Canadian Producers in the softwood lumber industry," the claims of the Canadian softwood lumber producers for declaratory and injunctive relief were moot. *Id.* at 36a.

The court of appeals likewise held that the claims of the sole Canadian magnesium producer had become moot. Pet. App. 36a-37a. The court noted that the countervailing duty orders on pure and alloy magnesium from Canada had been revoked on July 6, 2006, shortly after the Court of International Trade's judgment, and that the sole plaintiff with respect to that product, Norsk Hydro Canada, had announced its intent to close its Canadian plant during the first half of 2007. *Id.* at 16a. In light of those developments, the court of appeals held that Norsk Hydro Canada no longer could claim likely competitive injury based on CDSOA distributions and that its claims for declaratory and injunctive relief were therefore moot. *Id.* at 37a. The court of appeals also affirmed the Court of International Trade's conclusion that the Government of Canada lacked standing, although on different grounds from those relied upon by the trial court. See *id.* at 28a-34a.

The court determined that the Canadian Wheat Board alone among the plaintiffs had standing to assert claims that were not moot. Pet. App. 20a, 37a. The court affirmed the Court of International Trade's finding of fact that the promotional activities of the North Dakota Wheat Commission had been responsible for helping domestic wheat producers take market share from the Canadian Wheat Board, and its determination that receipt by the Commission of as much as $180,000

in CDSOA distributions was likely to further injure the Board. *Id.* at 25a, 37a.

Turning to the substance of the dispute, the court of appeals affirmed the Court of International Trade's conclusion that Section 102(c) of the NAFTA Implementation Act, 19 U.S.C. 3312(c), did not preclude the Canadian Wheat Board from pursuing its challenge to distribution of duties to the North Dakota Wheat Commission under the CDSOA. The court of appeals reasoned that "section 102(c)'s bar against causes of action based on 'the Agreement or by virtue of congressional approval thereof,' reads most naturally as barring only those suits brought under NAFTA itself or under section 101" of the NAFTA Implementation Act, 19 U.S.C. 3311, in which Congress approved NAFTA. Pet. App. 39a. Because the Board's suit was not brought under NAFTA or Section 101 of the NAFTA Implementation Act, the court of appeals concluded that Section 102(c) did not preclude judicial review of the Board's claim. *Id.* at 43a.

On the merits, the court of appeals affirmed the Court of International Trade's conclusion that Congress did not intend the CDSOA to apply to antidumping and countervailing duties collected on Canadian and Mexican merchandise. Pet. App. 43a-48a, 49a. In reaching that conclusion, the court relied upon the reasoning of the Court of International Trade. *Id.* at 44a. The court rejected the contention that because the CDSOA does not expressly except goods from NAFTA countries, the court "must infer from this silence that Congress intended the CDSOA to apply to goods from NAFTA countries regardless of section 408 of the NIA." *Id.* at 45a. The court reasoned, to the contrary, that the more reasonable inference from Congress's silence was that, "being aware of its earlier enactment of section 408 of

the NIA, [Congress] chose not to supercede section 408 nor to exempt the CDSOA from it." *Id.* at 46a. Finally, the court rejected the argument that Section 408 did not apply because the CDSOA was enacted as part of an appropriations bill and therefore constituted an exercise of Congress's spending power that was only tangentially related to the Tariff Act of 1930, ch. 497, 46 Stat. 590 and outside the reach of Section 408 of the NIA. The court noted that the CDSOA directs the creation of special accounts in the Treasury for deposit of antidumping or countervailing duties and distribution of funds in the special accounts to qualified domestic producers, such that deposited amounts would only rarely, if ever, reach the Treasury's general fund. *Id.* at 47a. The court therefore concluded that "the Canadian Wheat Board does in fact have recourse to challenge Customs' actions in this case." *Id.* at 48a.

Although the court of appeals affirmed the substance of the Court of International Trade's judgment, it struck that court's injunctive relief beyond that relating to Canadian wheat. Pet. App. 48a-49a. The court of appeals noted that "[t]he Canadian Wheat Board does not have standing to seek an injunction against distribution of duties assessed on softwood lumber or magnesium," but only with respect to "duties assessed on hard red spring wheat from Canada." *Id.* at 37a-38a n.22. The court of appeals therefore directed that the injunction be modified to strike the relief granted with respect to distribution of duties relating to softwood lumber and magnesium. *Id.* at 49a.

ARGUMENT

Petitioners contend that Section 102(c) of the NAFTA Implementation Act, 19 U.S.C. 3312(c), pre-

cludes any private party from invoking any provision of the NAFTA Implementation Act. The court of appeals correctly rejected that argument. Moreover, the court's holding on the merits concerns the construction of a statute that has been repealed, and the underlying dispute arose in the context of an international trade dispute that has been resolved in significant part by Executive Agreement. That holding therefore does not warrant this Court's review.

Nor does petitioners' challenge to Section 408 of the NIA as an impermissible legislative entrenchment warrant this Court's review because the court of appeals did not apply Section 408 in that fashion. Rather, it treated the provision as a guide to legislative interpretation that was not overcome by any contrary indications. We note, in addition, that if the Court were to grant the petition for a writ of certiorari, it would, before reaching the questions presented by petitioners, need to resolve the threshold question of whether petitioners, who intervened in defense against claims asserted by plaintiffs whose complaints have since been dismissed by the lower courts, are proper parties to seek review of the court of appeals' judgment.

1. The court of appeals correctly rejected the sweeping construction of Section 102(c) of the NIA offered by petitioners, and its holding does not warrant this Court's review.

a. Section 102(c) of the NIA provides, in relevant part, that "[n]o person other than the United States * * * shall have any cause of action or defense under * * * the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. 3312(c)(1)(A). In enacting that provision, Congress made it clear that NAFTA does not constitute enforceable domestic law except in a suit

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brought by the United States. Congress intended NAFTA to be viewed as a government-to-government agreement that, with certain exceptions not relevant here, cannot be enforced by private individuals and, thus, cannot provide the basis for any private claim or defense asserted in domestic courts. Section 102(c) confirms that Congress intended NAFTA to be viewed as an agreement that generally affects only the rights and obligations of the sovereign nations and that therefore cannot provide the basis for any private claim or defense asserted in domestic courts. *Kwan* v. *United States*, 272 F.3d 1360, 1362-1363 (Fed. Cir. 2001) (citing *Edye* v. *Robertson*, 112 U.S. 580, 598 (1884)) (additional citations omitted).

Petitioners challenge the court of appeals' characterization of Section 102(c) "*as barring only those suits brought under NAFTA itself or under section 101 of the* [NIA]." Pet. 25 (quoting, with added emphasis, Pet. App. 39a). See Pet. 26 (describing the court of appeals' decision as holding that Section 102(c) "only bars causes of action that arise under Section 101(a) of the NAFTA Implementation Act"). The United States agrees that the quoted language could, depending on how it is applied in future cases, give too cramped a reading to Section 102(c). The section's reference to "defense[s]" in addition to "cause[s] of action," 19 U.S.C. 3312(c)(1)(A), and its further prohibition against challenging government action or inaction "on the ground that such action or inaction is inconsistent with the Agreement," 19 U.S.C. 3312(c)(2), reflects that Congress intended not only to preclude suits asserting purported causes of action based directly on NAFTA or Section 101 of the implementing legislation, but more broadly to preclude private parties from relying on the provisions of NAFTA

in support of a claim or defense, even when the suit is brought under a general statutory provision such as the APA. To the extent the court of appeals' decision can be read to suggest that Section 102(c) is inapposite merely because "the Canadian Wheat Board instituted this suit under" the APA, Pet. App. 38a, such a reading of Section 102(c) would be erroneous.

Contrary to petitioners' suggestion, however, the actual holding of the court of appeals was the narrower one that Section 102(c) does not preclude a private party—in a suit contesting application of the CDSOA to Canadian goods—from invoking the interpretive guidance provided by Section 408 of the NIA. To be sure, there is room for debating the precise question whether Section 408 should be regarded, in light of the policies reflected in Section 102(c), as the type of statutory provision that Congress intended to be invoked by private parties or merely as reflecting the sovereign-to-sovereign commitments undertaken in NAFTA Article 1902. See Gov't Reply in Support of Its Motions to Dismiss 3-7. But that is because of the particular nature of the undertaking in Article 1902 of NAFTA, 32 I.L.M. 682, which states a rule similar to that in Section 408, see Pet. App. 40a, not because of a categorical rule that no provision of the implementing legislation can be invoked by private parties. In the court of appeals, the United States argued, for example, that the private plaintiffs lacked prudential standing because Section 408 should not be construed as intending to protect the interests of private producers. See Gov't C.A. Br. 46-49.[2] The court of appeals rejected

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[2] In the Court of International Trade, the United States had urged that the Government of Canada's and private plaintiffs' claims, while styled as relying on Section 408 of the NIA, were in fact attempts to give impermissible direct judicial effect to NAFTA Article 1902(2), 32

that contention, see Pet. App. 28a, and petitioners do not seek review of that narrow question of statutory construction.

b. Petitioners argue that Section 102(c) broadly precludes any private party from attempting to give *any* legal effect to *any* provision of federal law that was enacted as part of the NAFTA Implementation Act. See Pet. 32 (urging that Congressional "approval" in Section 102(c) should be equated with "implementing legislation"). That construction of Section 102(c) is mistaken.

Section 102(c) does not categorically preclude private parties from relying on any and all federal statutory provisions that were enacted as part of the NAFTA Implementation Act. By its terms, the relevant text of Section 102(c) precludes suits or defenses "under the Agreement or by virtue of Congressional approval thereof." 19 U.S.C. 3312(c)(1)(A). As the court of appeals noted, Pet. 39a, "Congressional approval" of the Agreement was accomplished in Section 101(a) of the NIA, 19 U.S.C. 3311(a) ("the Congress *approves* — (1) the North American Free Trade Agreement" (emphasis added)); see 19 U.S.C. 3301(1) (defining the term "Agreement" as "the North American Free Trade Agreement *approved by the Congress under section 3311(a) of this title*" (emphasis added)). The substantive

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I.L.M. 682. See Gov't Reply in Support of Its Motions to Dismiss 5-7. In the Court of International Trade's opinion, it made clear that it was not relying on "the Agreement itself," Pet. App. 135a, but relying on Section 408 only as a statutory guide to interpreting a subsequent enactment, *id.* at 148a. Because the United States does not regard such reliance on Section 408 as inconsistent with Section 102(c), the United States did not appeal the court's holding as inconsistent with Section 102(c). Instead, the United States contested only whether the private plaintiffs had prudential standing to invoke Section 408. See Gov't C.A. Br. 46-49.

provisions of the NAFTA Implementation Act by which Congress implemented the United States' international obligations under NAFTA do not constitute Congress's "approval" of the Agreement, but rather its implementation of the Agreement. See Pet. App. 40a. As this Court recently noted, "implementing legislation passed by Congress" is how Congress gives "domestic effect" to treaties that might not otherwise have "automatic domestic effect as federal law upon ratification." *Medellin* v. *Texas*, 128 S. Ct. 1346, 1356-1357 n.2 (2008). By analogy, NAFTA is the equivalent of the treaty negotiated by the President and congressional approval in Section 101(a) of the INA the equivalent of Senate consent to ratification. Section 102(c) makes clear that neither of those actions gives rise to privately enforceable rights. Under petitioners' reading of Section 102(c), however, that provision not only precludes private individuals from relying on "the Agreement or * * * Congressional approval thereof," 19 U.S.C. 3312(c)(1)(A), but also from relying on the implementing legislation by which Congress gave domestic legal effect to the United States' international commitments under NAFTA. Nothing in the text of Section 102(c) supports that conclusion.

Nor, contrary to petitioners' contentions (Pet. 28-31), does the legislative history provide a basis for adding to the text of Section 102(c) in a way that would deprive the implementing legislation of enforceable legal effect. Rather, as the court of appeals observed, both the Statement of Administrative Action, in which the Executive explained the effect of the NIA, and the House Report that accompanied the bill confirm that Section 102(c)'s reference to "Congressional approval" means the approval effectuated by Section 101(a). See Pet. App. 41a;

H.R. Doc. No. 159, 103d Cong., 1st Sess. Vol. I, at 462 (1993) (explaining that NIA Section 102(c) precludes "private right[s] of action based on the NAFTA, or on *Congressional approval of the Agreement in section 101(a)*") (emphasis added); H.R. Rep. No. 361, 103d Cong., 1st Sess. Pt. I, at 18 (1993) (Section 102(c) contains a "general prohibition on private right[s] of action arising from the NAFTA, the supplemental agreements, or *approval of the NAFTA by Congress under section 101(a) of the bill*") (emphasis added).

c. Petitioners urge the Court to grant the petition in order to resolve an asserted conflict between the court of appeals' decision and the non-precedential decision of the United States Court of Appeals for the Ninth Circuit in *Bronco Wine Co.* v. *ATF*, 168 F.3d 498 (Table), No. 98-15444, 1999 WL 68632 (Feb. 11, 1999), cert. denied, 528 U.S. 950 (1999). Because that decision is non-precedential, and because the United States' position with respect to the scope of provisions such as Section 102(c) of the NIA has changed since the *Bronco Wine* decision, there is no need for this Court to resolve the purported conflict.

In *Bronco Wine*, the plaintiff alleged that the Bureau of Alcohol, Tobacco and Firearms' application to the plaintiff's wines of the place-of-origin regulations in 27 C.F.R. 4.39, was inconsistent with the Lanham Act, 15 U.S.C. 1052(a), as amended by the Uruguay Round Agreements Act (URAA), Pub. L. No. 103-465, 108 Stat. 4809. The district court held that judicial review of the plaintiff's cause of action was precluded by Section 102(c) of the URAA, 19 U.S.C. 3512(c)(1)(A), which is in substance identical to Section 102(c) of the NAFTA Implementation Act, 19 U.S.C. 3312(c)(1)(A). *Bronco Wine Co.* v. *United States Dept. of Treasury*, 997 F. Supp.

1318, 1321-1323 (E.D. Cal. 1997). On appeal, the Ninth Circuit affirmed in a non-precedential memorandum opinion. *Bronco Wine*, 1999 WL 68632, *1. Without further explanation, the Ninth Circuit agreed with the district court that "the Lanham Act does not provide a cause of action under which Bronco could bring a claim," *ibid.* (citing 19 U.S.C. 3512(c)(1)(A)'s language that no private party "shall have a cause of action under the [Uruguay Round] Agreement").

As the court of appeals noted in its opinion below, it is difficult to understand the precise reasoning of the Ninth Circuit in *Bronco Wine*. Pet. App. 42a-43a. It is possible, in light of the opinion's reference to 19 U.S.C. 3512(c)(1)(A)'s bar on causes of action "under the Agreement" and its omission of any reference to that section's bar on causes of action based on "Congressional approval" of the agreement, that the Ninth Circuit "conflated the URAA with the Uruguay Round Agreements" and "affirm[ed] the district court's dismissal of claims brought under the URAA on the grounds—true but irrelevant—that section 102(c) bars claims brought under the Agreements themselves." *Ibid.* Because the Ninth Circuit's decision is not precedential, a future panel of the Ninth Circuit would not be bound by that decision and would be free to align itself instead with the Federal Circuit's decision in this case. For that reason, and because the reasoning of *Bronco Wine* is unclear, there is no need for this Court to grant review in order to resolve any asserted conflict.

The possibility that the Ninth Circuit would not follow the holding in *Bronco Wine* is particularly high because the position of the United States has changed since the time *Bronco Wine* was decided. As petitioners note (Pet. 16-17 n.7), in the Government's brief in oppo-

sition to a petition for a writ of certiorari in *Bronco Wine*, the United States asserted that 19 U.S.C. 3512(c)(1)(A) barred any claim by a private party that government action was inconsistent with a provision of law enacted as part of the URAA. See *Bronco Wine*, *supra*, Br. for Resps. in Opp. 8-11 (No. 99-119). As explained above, see *supra* 13-15, the United States no longer interprets that language as establishing a categorical bar to a private party invoking a federal statutory provision that was enacted as part of the legislation that implemented the NAFTA and Uruguay Round Agreements in domestic law.

d. Review by this Court is particularly unnecessary in light of the fact that the trade dispute that gave rise to this litigation has been largely resolved. The statute about which the Government of Canada and private plaintiffs complained, the CDSOA, has been repealed, and the only remaining issues under it regard the distribution to qualifying domestic producers of duties collected on imports before October 1, 2007. Moreover, the particular product that gave rise to the largest duties on Canadian goods subject to distribution under the CDSOA, Canadian softwood lumber, were resolved by an Executive Agreement pursuant to which countervailing and antidumping duty orders on Canadian softwood lumber were rescinded, collection of countervailing and antidumping duties on such lumber ceased as of October 12, 2006, and deposits previously collected under the revoked orders were refunded to the importers. See pp. 6-7, *supra*. In light of the fact that the trade dispute has been largely resolved by Executive and Congressional action, there is no need for this Court to address the legal issues further by writ of certiorari.

2. The second issue on which petitioners seek review by this Court is whether what they call the "'magic password' provision" in Section 408 of the NAFTA Implementation Act "is an impermissible legislative entrenchment provision that restricts Congress' power of the purse." Pet. i. The court of appeals did not, however, hold that Section 408 binds later Congresses to use particular words in order to apply future amendments to the unfair trade laws to other NAFTA parties. Instead, the court of appeals merely treated Section 408 as a tool of interpretation that was not overcome by congressional "silence," as petitioners had urged. Pet. App. 45a. Although the court of appeals' own analysis of the point is not extensive, it noted its reliance upon the reasoning of the Court of International Trade. See *id.* at 44a-45a. That court acknowledged "that 'no magical password' is necessarily required" to overcome Section 408, but determined that there was, in this case, neither "any 'necessary implication,' [n]or even 'fair' implication, that Congress intended to trump Section 408 when enacting" the CDSOA. *Id.* at 147a. The court treated Section 408 as a "background canon[] of interpretation of which Congress [was] presumptively aware" when it enacted the CDSOA, *id.* at 148a (quoting *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring)), not as an impermissible attempt by one Congress to bind another. The second question presented by the petition does not, therefore, warrant this Court's review.

3. Finally, we note that the petition raises a threshold question whether petitioners are proper parties to seek a writ of certiorari from this Court with respect to the judgment below. Petitioners U.S. Magnesium and United States Steel intervened, respectively, as defendants in the actions by Norsk Hydro Canada and the

Government of Canada, in light of petitioners' interest in their rights to distributions under the CDSOA of duties collected on Canadian magnesium and steel. But the complaints of Norsk Hydro Canada and the Government of Canada were dismissed for mootness and lack of standing. Pet. App. 48a-49a. Petitioners never intervened with respect to the action of the remaining plaintiff with claims that were not moot—the Canadian Wheat Board. Moreover, the court of appeals specifically held that the Canadian Wheat Board lacked standing to seek injunctive relief with respect to products other than wheat, and the court expressly directed that the injunction be modified to reflect that it only precluded distribution of duties under the CDSOA with respect to wheat. *Ibid.* Thus, the judgment of the court of appeals does not, by its own force, preclude distribution of duties to domestic producers of other products, including steel and magnesium products with respect to which petitioners have an interest.

Although Customs has indicated that, in light of the court of appeals' opinion's precedential effect, Customs will cease distribution of duties under the CDSOA with respect to other Canadian and Mexican goods as well, 71 Fed. Reg. 57,000 (2006), the judgment in this case does not itself enjoin the government to do so. If the Court were to grant the petition, it would need to address, at the threshold, whether the Court of International Trade's consolidation order made petitioners parties to the action by the Canadian Wheat Board—even though they had no dispute with the Board—and are thereby bound by the declaratory judgment that was entered in favor of that plaintiff. See Pet. App. 49a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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